

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN BEST,
Plaintiff,
v.
VIRGIL SMITH,
Defendant.

Case No. 4:19-cv-02252-YGR

**ORDER DENYING DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

Dkt. No. 96

Plaintiff Brian Best brings this action against defendant Virgil Smith, alleging violation of his constitutional rights under the Fourth Amendment of the United States Constitution. (Dkt. No. 50.)

Now before the Court is defendant’s motion for summary judgment. (Dkt. No. 96.) The matter was fully briefed by the parties. (*See also* Dkt. Nos. 106 and 108.)

Having carefully considered the briefing submitted, the pleadings in this action, oral argument, and for the reasons stated on the record at the July 27, 2021 hearing, the Court hereby **DENIES** defendant’s motion for summary judgment.¹ The Court further **DENIES** defendant’s request for judicial notice as moot.

Defendant moved for summary judgment on three grounds: (1) that Best’s claim is barred by statute of limitations; (2) that defendant used reasonable force; and (3) that qualified immunity applies.

With respect to the statute of limitations argument, the Court finds that Best’s claim is not barred by the statute of limitations. The parties do not dispute that Best was arrested on April 24,

¹ The parties do not dispute any of applicable standards for this motion. Thus, the Court will not recite the standards here.

2017 and held in custody until April 25, 2017. Because 42 U.S.C. Section 1983 does not contain its own limitation period, courts apply the two-year statute of limitations for personal injury matters to Section 1983 claims. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (citing *Wilson v. Garcia*, 471 U.S. 261, 276-79 (1985), *superseded by statute on other grounds as stated in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-78 (2004)); *see also Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). Notwithstanding that, federal courts must give effect to a state's tolling provisions. *Hardin v. Straub*, 490 U.S. 536, 543-44 (1989). California tolls the statute of limitations period for up to two years when a person is imprisoned on a criminal charge. *See California Civil Procedure* § 352.1. Thus, in the Ninth Circuit, tolling is triggered by a person's arrest and continues while they remain incarcerated. *See Elliott v. City of Union City*, 25 F.3d 800, 802-03 (9th Cir. 1994); *Boag v. Chief of Police*, 669 F.2d 587, 589 (9th Cir. 1982). Because Best was not released from custody until April 25, 2017, the statute of limitations period did not begin to run until then. Given that, the statute of limitations did not expire until April 25, 2019, the same day Best filed this action. Accordingly, the Court **DENIES** defendant's motion for summary judgment on this ground.

Having found that Best's claim is not barred on statute of limitations grounds, the Court now addresses defendant's argument that summary judgment is appropriate because his actions were objectively reasonable. Viewing the evidence in the light most favorable to the non-moving party, Best, the Court finds that genuine issues of material facts exist as to whether defendant's actions were reasonable. First, the parties dispute the nature and quality of force used. Best argues that defendant used great force when defendant put him in a rear naked choke form (carotid hold) and drove him to the ground. According to Best, such force caused him to lose his consciousness for a brief period. Defendant argues that he started to perform a carotid hold but abandoned his efforts once Best moved his head because application of the hold was no longer safe. Instead, defendant argues that he only utilized a control hold, applying pressure only to Best's shoulder and pushing him to the ground. Defendant also argues that Best never lost consciousness. Viewing the facts in light most favorable to the non-moving party, the Court finds that a genuine dispute remains as to the level, nature, and impact of the force used.

1 Next, in evaluating the government’s interests at stake, the parties dispute whether Best
2 posed as a threat to the officers. Defendant argues that he reasonably concluded that Best posed a
3 threat to defendant and Deputy Fazzio because Best tensed his body, pulled away from Deputy
4 Fazzio’s grasp, and turned to face her as he used an angry tone to tell her not to touch him. Best
5 disputes this, arguing instead that his response was a natural reflex and did not involve him
6 extending any part of his body towards either officer. The parties also dispute whether Best was
7 resisting arrest. Viewing the evidence in the light most favorable to Best, a genuine dispute exists
8 as to whether Best posed a threat to the officers.

9 In sum, balancing Best’s Fourth Amendment interest against the governmental interests at
10 stake, the Court finds that disputes of material facts preclude a finding that defendant’s use of
11 force was objectively reasonable. Accordingly, the Court **DENIES** defendant’s motion for
12 summary judgment on this ground.

13 The Court now considers whether to grant defendant’s motion for summary judgment on
14 the basis of qualified immunity. Qualified immunity is a question of law, not of fact. *Torres v.*
15 *City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008). An officer is entitled to qualified
16 immunity if: (1) the disputed facts taken in the light most favorable to the party asserting the
17 injury do not show that the officer’s conduct violated a constitutional right, or (2) the
18 constitutional right was not clearly established at the time of the incident. *See e.g., CarePartners,*
19 *LLC v. Lashway*, 545 F.3d 867, 876 (9th Cir. 2008). To be clearly established, “[t]he contours of
20 the right must be sufficiently clear that a reasonable official would understand that what he is
21 doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987.)

22 Here, viewing the evidence in the light most favorable to Best, defendant’s actions could
23 be found by a jury to constitute excessive force. Defendant applied a carotid hold to Best,
24 rendering him unconscious, when Best was not resisting arrest, and posed no threat to any of the
25 officers.

26 Assuming these facts for the purpose of the second part of the qualified immunity test,
27 there was clearly established precedent that would have made it sufficiently clear to defendant that
28 his actions were unconstitutional. *Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2003)


1 squarely addressed the constitutionality of the use of a chokehold on a non-resisting person. In
2 *Barnard*, officers placed a non-resisting individual in a chokehold as they tried to arrest him. *Id.*
3 at 1072. The officers argued that they were entitled to qualified immunity as a matter of law
4 because they believed plaintiff was resisting arrest. The Ninth Circuit held that, at the time of the
5 incident, “a reasonable officer would have known that it would clearly violate established law to
6 use a chokehold on a non-resisting arrestee . . .” *Id.* at 1073. Applying *Barnard*, the Court finds
7 that defendant is not entitled to summary judgment on the basis of qualified immunity.
8 Accordingly, defendant’s motion is **DENIED** on this ground.

9 The parties are Ordered to appear for a pre-trial scheduling conference on **MONDAY,**
10 **AUGUST 30, 2021 AT 2:00 PM.**

11 This order terminates Docket Number 96.

12 **IT IS SO ORDERED.**

13 Dated: July 30, 2021

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15 YVONNE GONZALEZ ROGERS
16 UNITED STATES DISTRICT JUDGE
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